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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 EUFEMIA ALAMO RAMIREZ,
12 BOP #95287-198,

13 Plaintiff,

14 vs.

14 PAULA M. JARNECKE, Warden;
15 ROBERT E. McFADDEN, Director,

16 Defendants.
17

Civil 08-0976 WQH (CAB)
No.

**ORDER DIRECTING U.S.
MARSHAL TO EFFECT SERVICE
OF FIRST AMENDED COMPLAINT
PURSUANT TO FED. R. CIV. P.
4(c)(3) AND 28 U.S.C. § 1915(d)**

18 **I. Procedural History**

19 Plaintiff, an inmate currently incarcerated at the Metropolitan Correctional Center, located
20 in San Diego, California and proceeding pro se, filed a civil rights Complaint pursuant to 42
21 U.S.C. § 1983 on June 2, 2008. In addition, Plaintiff filed a Motion to Proceed *In Forma*
22 *Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). On June 19, 2008, this Court granted
23 Plaintiff’s Motion to Proceed IFP but simultaneously dismissed his Complaint for failing to state
24 a claim upon which relief could be granted. (*See* June 19, 2008 Order at 4-5.) Nonetheless, the
25 Court granted Plaintiff forty five days to submit a First Amended Complaint correcting the
26 deficiencies of pleading noted in the Court’s Order. (*Id.* at 5.) On July 15, 2008, Plaintiff filed
27 his First Amended Complaint (“FAC”).

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1 II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A

2 As the Court stated in its previous Order, the Prison Litigation Reform Act obligates the
 3 Court to review complaints filed by all persons proceeding IFP and those, like Plaintiff, who are
 4 “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated
 5 delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial
 6 release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C.
 7 §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss
 8 prisoner and all other IFP complaints, or any portions thereof, which are frivolous, malicious,
 9 fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
 10 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 11 (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

12 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 13 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28
 14 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner’s suit
 15 make and rule on its own motion to dismiss before directing that the Complaint be served by the
 16 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,
 17 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
 18 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 19 § 1915A).

20 Here, the Court finds that Plaintiff’s Eighth Amendment claims in his First Amended
 21 Complaint survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b),
 22 and that Plaintiff is therefore automatically entitled to U.S. Marshal service on his behalf. *See*
 23 *Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and
 24 serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (providing that
 25 “service be effected by a United States marshal, deputy United States marshal, or other officer
 26 specially appointed by the court . . . when the plaintiff is authorized to proceed *in forma pauperis*
 27 pursuant to 28 U.S.C. § 1915.”). Plaintiff is cautioned, however, that “the sua sponte screening
 28 and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6)

1 motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119
2 (S.D. Cal. 2007).

3 **III. Conclusion and Order**

4 Good cause appearing, **IT IS HEREBY ORDERED** that:


5 1. The United States Marshal shall serve a copy of the First Amended Complaint and
6 summons upon Defendants as directed by Plaintiff on U.S. Marshal Form 285. All costs of
7 service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

8 2. Defendants are thereafter **ORDERED** to reply to the First Amended Complaint
9 within the time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a).
10 *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted to “waive the
11 right to reply to any action brought by a prisoner confined in any jail, prison, or other
12 correctional facility under section 1983,” once the Court has conducted its sua sponte screening
13 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
14 determination based on the face on the pleading alone that Plaintiff has a “reasonable
15 opportunity to prevail on the merits,” Defendants are required to respond).

16 3. Plaintiff shall serve upon Defendants or, if appearance has been entered by
17 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
18 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
19 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
20 of any document was served on Defendants, or counsel for Defendants, and the date of service.
21 Any paper received by the Court which has not been filed with the Clerk or which fails to
22 include a Certificate of Service will be disregarded.

23 **IT IS SO ORDERED.**

24 DATED: October 15, 2008

25 
26 **WILLIAM Q. HAYES**
27 United States District Judge
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